UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARMANDO HERNANDEZ, MICHAEL WANDS, JOE ALVAREZ, BALMORES ORTIZ, DAVID RODRIGUEZ, LUIS TEJEDA, CHAD GOURLEY, JOSEPH GASDIA, PAUL GASDIA, ERIC CLEVELAND, JASON DIXON and ERIC BOLISKI, Individually and on Behalf of All Others Similarly Situated, As Class Representatives,	**06 CV 2675 (CLB) (MDF)**
Plaintiffs,	
v.	
C&S WHOLESALE GROCERS, INC. and RICHARD "RICK" B. COHEN,	
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY DUPLICATIVE COUNTS IN A SECOND-FILED FLSA COLLECTIVE ACTION AND STATE WAGE AND HOUR CLASS ACTION UNDER THE FIRST-TO-FILE RULE

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INTRODUCTION AND BASIS OF THIS MOTION

Almost one and a half years ago, Plaintiffs[1] filed the instant Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., collective action and six (6) state wage and hour class actions against Defendants C&S Wholesale Grocers, Inc. and its Chairman and Owner, Defendant Richard "Rick" B. Cohen (collectively, "Defendants" or "C&S").[2] The twelve named Plaintiffs work or have worked at C&S warehouses in six Northeastern states: New York, Connecticut, Pennsylvania, Vermont and Massachusetts, and Maryland

As this Court is aware from the last status conference held on March 30, 2007, the parties have agreed to mediate the case before former federal Judge Nicholas H. Politan. The mediation is set for October 1st and 3rd, 2007. The parties met recently with Judge Politan on August 7th to discuss the framework for the mediation and the history of the case.

With the mediation looming and the parties engaged in extensive preparations for mediation, Plaintiffs' counsel just learned from defense counsel that a separate FLSA case had been filed against C&S in the District Court in Connecticut (styled Mahaney v C&S) which parrots many of the allegations in the present Hernandez case, and in many instances lifts paragraphs *verbatim* from the Hernandez complaint. (The Hernandez and Mahaney complaints are attached respectively as Exhibits A & B to the accompanying Affidavit of Plaintiffs' Counsel, Steven Wittels). It is plain that this later-filed case is simply a copy-cat case seeking to tag on to the present Hernandez case before this Court.

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[1] The Named Representative Plaintiffs are Armando Hernandez, Michael Wands, Joe Alvarez, Balmores Ortiz, David Rodriguez, Luis Tejeda, Chad Gourley, Joseph Gasdia, Paul Gasdia, Eric Cleveland, Jason Dixon, and Eric Boliski (hereinafter "Plaintiffs" or "Hernandez Plaintiffs").
[2] Hereafter, this action will be referred to as "Hernandez."

The Mahaney case alleges ancillary claims not alleged in the Hernandez case. These claims include violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq., and violations of a Connecticut state wage and hour regulation, Conn. Agencies Regs. § 31-62-D1. Despite the ancillary claims alleged in Mahaney, however, the first-filed Hernandez case and second-filed Mahaney case are essentially duplicative lawsuits pending in separate federal courts. A resolution of the FLSA and state wage and hour violations in Hernandez would leave little to decide in the Mahaney case. This is recognized explicitly in the ERISA claims alleged in Mahaney, which characterize the violations as a direct "consequence of not receiving the proper wages and overtime to which [piece-rate incentive employees] are entitled." Mahaney Compl. ¶¶ 19 and 80.

While both lawsuits substantially overlap in their entirety, Plaintiffs in Hernandez only request that this Court stay the duplicative counts in Mahaney. Plaintiffs specifically seek a stay of the FLSA collective action claims alleged in Mahaney's first cause of action and the Connecticut class action claims alleged in the seventeenth cause of action, pending the outcome of these identical causes of action first-filed in Hernandez over one and a half years earlier. See Weinstein v. Metlife, Inc., No. C 06-04444, 2006 WL 3201045 (N.D. Cal. Nov. 6, 2006) (granting motion to stay plaintiff's duplicative third cause of action in second-filed FLSA and state wage and hour class action). For the reasons set forth below, this Court should grant the stay.

PROCEDURAL AND FACTUAL BACKGROUND

The accompanying Affidavit of Steven L. Wittels, Esq., counsel for Plaintiffs in Hernandez, contains a complete description of this action's factual and procedural background, and the Court is respectfully referred thereto.

ARGUMENT

I. THE FIRST-TO-FILE RULE SHOULD BE APPLED TO STAY THE DUPLICATIVE COUNTS IN THE SECOND-FILED *MAHANEY* CASE IN FAVOR OF THE FIRST-FILED *HERNANDEZ* CASE.

A. The Applicable Case Law On The "First-To-File" Rule.

The "first-to-file" rule is a well-established doctrine of federal comity that was first recognized in Smith v. McIver, 22 U.S. 532 (1824). In Smith, the Supreme Court held that "[i]n all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." Id. at 535.

The "first-to-file" rule provides that where two courts have concurrent jurisdiction over an action involving the same or similar representative parties and the same issues, the court where the action was "first filed" has priority over the second action. D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106-07 (2d Cir.2006); New York v. Exxon Corp. at 1025; 800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F. Supp. 128, 131 (S.D.N.Y.1994). It is a rule of judicial economy that creates a "strong presumption in favor of the forum of the first-filed suit." New York v. Exxon Corp., 932 F.2d 1020, 1025 (2nd Cir.1991); 800-Flowers, supra, 860 F. Supp. at 128. A party seeking to overcome the presumption must show that "there are special circumstances which justify giving priority to the second action." Exxon Corp., 923 F.2d at 1025.

The court where the action was first filed decides the question of whether or not the "first-to-file" rule, or alternatively, an exception to the "first-to-file" rule, applies. Schnabel v. Ramsey Quantitative Sys., Inc., 322 F. Supp.2d 505, 510 (S.D.N.Y. 2004). It also has the authority to decide whether to stay, dismiss, or transfer the second action. See National Equip. Rental Ltd. v. A.L. Fowler, 287 F.2d 43, 45 (2nd Cir 1961) ("The bulk of authority supports the position that when a case is brought in one federal district court, and the case so brought embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the suitor in the more recently commenced case from taking any further action in the prosecution of that case."); see also Meeropol v. Nizer, 505 F.2d 232, 235 (2nd Cir. 1974) ("Where an action is brought in one federal district court and a later action embracing the same issue is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action.").

"A court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions." Curtis v. Citibank N.A., 226 F.3d 133, 138 (2nd Cir. 2000) (dismissal of duplicative claims); see also Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 186 (1952) (stay) First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 79 (2nd Cir.1989) (dismissal without prejudice); National Equipment Rental Ltd v. A.L. Fowler, 287 F.2d 43 (2nd Cir 1961) (parties enjoined); Devlin v. Transportation Communications Intl Union, 175 F.3d 121, 129-30 (2d Cir. 1999) (remanding for consideration of consolidation).

B. The First-To-File Rule Has Often Been Applied In FLSA Suits.

Courts have liberally applied the first-to-file rule to stay, dismiss and transfer duplicative FLSA collective actions cases later filed in another federal district court. See Weinstein v. Metlife, Inc., No. C 06-0444, 2006 WL 3201045 (N.D. Cal. Nov. 6, 2006) (district court applied first-to-file rule to stay plaintiff's duplicative third cause of action in second-filed FLSA and state wage and hour class action); Fuller v. Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686, 690 (E.D. Tenn. May 31, 2005) (district court applied first-to-file rule in an FLSA collective action to dismiss the second-filed case even though named plaintiffs were different); England v. New Century Financial Corp., No. 03-360-B-M1, 2005 U.S. Dist. LEXIS 8403 (M.D. La. Apr. 26, 2005) (district court applied first-to-file rule in an FLSA collective action to transfer the second-filed case to district court with first-filed FLSA case); Walker v. Progressive Casualty Ins. Co., No. C03-656R at *2, 2003 WL 21056704 (W.D. Wash. May 9, 2003) (district court dismissed a second-filed FLSA action even though the parties and issues were not identical to those in the first-filed FLSA action.)

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Based on the above precedent and the reasons set forth below, this Court should apply the first-to-file rule and stay the duplicative causes of action alleged in the second-filed Mahaney action.

1. *Mahaney* Was Filed Almost One And A Half Years After Hernandez.

The Hernandez case was filed well before the Mahaney case. Plaintiffs in Hernandez filed their case on April 6, 2006 in United States District Court, Southern District of New York. Almost one and a half years after Hernandez was filed, the

Plaintiffs in Mahaney filed a strikingly similar case in the United States District Court, District of Connecticut. Accordingly, the Hernandez case clearly has priority. See New York v. Exxon Corp., 932 F.2d 1020, 1025 (2d Cir.1991) (In the Second Circuit, there is generally a strong presumption in favor of the first-filed suit.); see also D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106-07 (2d Cir.2006); 800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F. Supp. 128, 131 (S.D.N.Y.1994).

2. The Parties in *Mahaney* Are Substantially Similar to the Parties in *Hernandez*.

The Mahaney case involves the same category of parties as the Hernandez case. In the Second Circuit, the first-to-file rule requires only that the parties be substantially similar. Meeropol v. Nizer, 505 F.2d 232, 235 (2nd Cir. 1974) ("This rule is applicable even where the parties in the two actions are not identical."). Application of the first-to-file rule is therefore appropriate even when the claims in the second action are not identical to the first.

C&S Wholesale Grocers, Inc. is undoubtedly the principal defendant in both Mahaney and Hernandez. The additional defendant in Hernandez – the CEO of C&S Wholesale Grocers, Inc., Rick Cohen – and the additional defendant in Mahaney – the Plan Administrator for the Retirement Plan of C&S Wholesale Grocers, Inc. -- do not overcome the substantial overlap between the defendants in both actions.

Mahaney involves the same category of plaintiffs as Hernandez. The named plaintiffs in both actions are piece-rate incentive employees at C&S Wholesale Grocers, Inc. and, therefore, are effectively identical See Fuller v. Abercrombie & Fitch Stores, Inc., 370 F.Supp.2d 686, 689 (E.D. Tenn. 2005) (finding the named plaintiffs in two FLSA collective actions were "effectively identical" because the named plaintiffs in both

actions were employees of the same defendant who held the same employment positions and their respective claims were based on their employment positions).

Both actions also seek to certify the same collective action on behalf of current and former C&S piece-rate incentive employees who were not properly compensated for overtime hours and "off-the-clock" hours. Compare Mahaney Compl. ¶ 14, with Hernandez Compl. ¶¶ 5, 6 and 68. Both actions also seek to certify the same Connecticut class on behalf of current and former C&S piece-rate incentive employees "who have been denied their full and legally required wages and overtime compensation, and proper working conditions," who worked "off-the-clock" without receiving appropriate pay, who suffered "unlawful deductions from [their] wages," and who were not "afford[ed] ... proper meal periods." Compare Mahaney Compl. ¶ 25, with Hernandez Compl. ¶¶ 5, 6, 9, 79, 81.

As the parties in the two actions substantially overlap, this Court should apply the first-to-file rule and stay the duplicative counts in the second-filed Mahaney case.

3. The Claims in *Mahaney* Are Substantially Similar to the Claims in *Hernandez*.

In determining whether the first-filed rule applies, a district court must consider whether in fact the two actions are duplicative. Curtis v. Citibank, N.A., 226 F.3d 133 (2nd Cir. 2000). This determination hinges on three factors: (1) the chronology of the actions; (2) the similarity of the parties involved; (3) the similarities of the issues at stake. Fuller v. Abercrombie & Fitch Stores, Inc., 370 F.Supp.2d 686, 688 (E.D. Tenn. 2005) (citing Alltrade, Inc. v. Uniweld Prods., Inc. 946 F.2d 622, 625-26 (9th Cir. 1991)). The rule applies when there is substantial overlap between the two competing cases in that

they have "substantially similar parties and claims." In re Cuyahoga Equip. Corp., 980 F.2d 110, 116-17 (2nd Cir.1992).

The Mahaney action involves the same claims as the Hernandez action. In the Second Circuit, the first-to-file rule requires only that the claims be substantially similar. In re Cuyahoga Equip. Corp., 980 F.2d 110, 116-7 (2nd Cir.1992) ("This rule usually applies when identical or substantially similar parties and claims are present in both courts."). Application of the first-to-file rule is therefore appropriate even when the claims in the second action are not identical to the first.

The Mahaney case alleges the same FLSA collective action claims as the Hernandez case. Both actions allege that Defendants have failed to pay Plaintiffs for all hours worked, including "off-the-clock" hours and overtime hours, in violation of the FLSA. Because both also allege that Defendants willfully violated the FLSA, a three-year statute of limitations applies to such violations. Compare Mahaney Compl. ¶ 49 with Hernandez Compl. ¶¶ 111 and 116.

The Mahaney case also alleges the same Connecticut wage and hour class action claims as the Hernandez case. Both allege that:

a. Defendants have failed to pay the Connecticut class of current and former C&S piece rate incentive employees their full and legally required wages and/or overtime compensation. Compare Mahaney Compl. ¶¶ 157-162 with Hernandez Compl. ¶¶ 172-177.

b. Defendants have failed to pay the Connecticut class of current and former C&S piece rate incentive employees for all hours worked "off-the-clock."

Compare Mahaney Compl. ¶¶ 158-159 with Hernandez Compl. ¶¶ 169-171.

c. Defendants have failed to provide the Connecticut class of current and former C&S piece rate incentive employees proper meal and/or rest breaks. Compare Mahaney Compl. ¶¶ 158-159 with Hernandez Compl. ¶¶ 186-191.

d. Defendants have made improper deductions from wages of the Connecticut class of current and former C&S piece rate incentive employees. Compare Mahaney Compl. ¶¶ 158-159 with Hernandez Compl. ¶¶ 159-165.

e. Defendants have failed to provide the Connecticut class of current and former C&S piece rate incentive employees proper working conditions. Compare Mahaney Compl. ¶¶ 158-159 with Hernandez Compl. ¶¶ 6 159-191.

As the claims in the two actions substantially overlap, this Court should apply the first-to-file rule and stay the duplicative counts in the second-filed Mahaney case.

CONCLUSION

Pursuant to the first-to-file rule, Plaintiffs in Hernandez respectfully request that this Court stay the proceedings of the duplicative First and Seventeenth Causes of Action alleged in Mahaney pending the outcome of identical causes of action alleged in Hernandez. Not only would such an outcome comport with the well-established first-to-file rule, but it would serve the interests of justice by avoiding duplicative litigation, and

thereby advance the purposes of FLSA collective actions and state wage and hour class actions.

DATED: New York, New York
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Respectfully submitted,

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